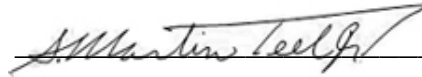


It is hereby  
ORDERED that the Order set forth below is  
hereby signed as an order of the court to be entered  
by the clerk.



Signed: December 10, 2004.

  
S. Martin Teel, Jr.  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF COLUMBIA

In re	)	
	)	
KENNETH BARNES,	)	Case No. 04-00426
	)	(Chapter 13)
Debtor.	)	

ORDER RE NOTICE OF BAR DATE FOR FILING CLAIMS

The clerk's office has advised the court that the notice sent to creditors regarding the conversion of this case to one under chapter 13 of the Bankruptcy Code left blank the space after the words:

Deadline to File a Proof of Claim: For all creditors  
(except a governmental unit):

Accordingly, creditors have never been notified of the deadline of Rule 3002(c) of the Federal Rules of Bankruptcy Procedure for filing proofs of claim as required by Rule 2002(f)(3). Although the deadline will expire in three days, and creditors will not receive notice of the deadline in time to file claims, the court is without authority to fix a new deadline as Rule 9006(b)(3) prohibits the court from doing so.

Young v. United States, 535 U.S. 43 (2002), recognizes an equitable tolling power in the bankruptcy court. However, Young cautioned that equitable tolling ought not be invoked when it "would be 'inconsistent with the text of the relevant statute,' United States v. Beggerly, 524 U.S. 38, 48, 118 S.Ct. 1862, 41 L.Ed.2d 32 (1998)." Young, 535 U.S. at 49. This case does not fall within the limited circumstances in which courts have used their equitable power to enlarge bar dates, and in light of the structure of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure, the court should hesitate to enlarge the bar date.

## A.

Although Rule 2002(c)(3) required the clerk to give notice, the rule does not specify the consequences of leaving the bar date blank in a notice of the commencement of the case. Cf. Herman v. Bateman (In re Bateman), 254 B .R. 866, 868 (Bankr. D. Md. 2000) (regarding the 30-day notice provision of Rule 4007(c),<sup>1</sup> the court observed that Rule 4007(c) "says nothing about what occurs if it is not honored"

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<sup>1</sup> Here, Rule 2002(c)(3) does not even set a minimum amount of time for giving notice of the Rule 3002(c) deadline.

and found time-barred a late § 523(c) complaint filed by a creditor with knowledge of the case less than 30 days before the Rule 4007(c) deadline for filing a § 523(c) complaint).

B.

Rule 9006(b)(3) prohibits enlargement of the bar date other than as permitted by Rule 3002(c), and none of the exceptions of Rule 3002(c) apply here. Rule 3002(c) controls the filing of claims in chapter 7 of the Bankruptcy Code as well as chapter 13, and so it is instructive to examine the treatment of late claims in chapter 7. Chapter 7, in contrast to chapter 13, permits a tardily filed claim to share in the same manner as a timely filed claim if "the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim" and if "proof of such claim is filed in time to permit payment of such claim." 11 U.S.C. § 726(a)(2)(C). Congress' failure to adopt a similar rule for chapter 13 is strong statutory evidence that tardily filed claims in chapter 13 are not to share in distributions under a confirmed chapter 13 plan even when the creditor was not given notice of the bankruptcy case until after the bar date.

Assuming that due process rights apply, those rights will usually be protected by the ineffectiveness of the plan to

discharge claims of creditors who were not given notice (and who were thus not afforded due process and not "provided for" by the plan within the meaning of the chapter 13 discharge provision, 11 U.S.C. § 1328(a)), and by the ability of such creditors to seek relief from the automatic stay. In other words, it is the debtor who will suffer the consequences of no claim being filed for a creditor when it was not given notice of the pendency of the case.<sup>2</sup>

The structure of the Code and the Rules has led to the conclusion that the court generally cannot use its equitable powers to enlarge the bar date for filing claims in chapter 13. See Gardenhire v. United States Internal Revenue Service (In re Gardenhire), 209 F.3d 1145 (9th Cir. 2000) (equitable tolling could not be applied to extend the filing period for proofs of claim for the amount of time the case was in a posture of having been erroneously dismissed). Even when a creditor receives no notice of the bankruptcy case, bankruptcy courts have held that they are without power to enlarge the chapter 13 claims filing bar date. In re McNeely, 309 B.R.

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<sup>2</sup> Under Rule 3004, the debtor can file a proof of claim on behalf of a creditor, and Rule 9006(b)(1) permits the debtor to move for an enlargement of time to do so, but if the motion is filed after the Rule 3004 bar date, the debtor must show that the failure timely to file a proof of claim was the result of excusable neglect.

711 (Bankr. M.D. Pa. 2004); In re Wright, 300 B.R. 453, 458-59 (Bankr. N.D. Ill. 2003); In re Bennett, 278 B.R. 764, 765-66 (Bankr. M.D. Tenn. 2001); In re Brogden, 274 B.R. 287 (Bankr. M.D. Tenn. 2001). Although IRS v. Hildebrand, 245 B.R. 287 (M.D. Tenn. 2000), appeal dismissed for lack of subject matter jurisdiction, 248 F.3d 484 (6th Cir. 2001), held to the contrary, it relied on a decision that was reversed in Gardenhire, and is unpersuasive. This case is an even stronger case for not enlarging the bar date because creditors were aware of the case.

C.

This case is distinguishable from those rare cases in which the courts have found a power to enlarge the bar date (for proofs of claim or for § 523(c) complaints), in the face of a rule prohibiting an enlargement of time, when the clerk's office or the debtor has misled creditors as to the bar date. See In re Collier, 307 B.R. 20 (Bankr. D. Mass. 2004) (the debtor there affirmatively misrepresented that a different bar date was to be set, such that equitable estoppel was applied to allow a late claim on the basis of due process); Nicholson v. Isaacman (In re Isaacman), 26 F.3d 629, 632 (6th Cir. 1994) (court has power under 11 U.S.C. § 105 to enlarge filing time when clerk has affirmatively misled creditors as to

dischargeability complaint deadline); Themy v. Yu (In re Themy), 6 F.3d 688, 690 (10th Cir. 1993) (same); Anwiler v. Patchett (In re Anwiler), 958 F.2d 925, 929 (9th Cir.), cert. denied, 506 U.S. 882 (1992) (same).<sup>3</sup> This case turns upon a notice that did not affirmatively mislead: it simply left the deadline blank. No creditor could reasonably have been misled to think that there was no bar date, and thus this case is distinguishable. See Neeley v. Murchison, 815 F.2d 345, 346 (5th Cir. 1987) (bar date for dischargeability complaints was left blank in notice to creditor advising of the commencement of the case).

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<sup>3</sup> Cf. Carlisle v. United States, 517 U.S. 416 (1996) (Court has recognized an exception to deadline for notice of appeal based on reliance on erroneous information by trial judge as in Thompson v. INS, 375 U.S. 384 (1964)). Although Moore v. South Carolina Labor Bd., 100 F.3d 162, 164 (D.C. Cir. 1996) (per curiam), held that the time for appeal would not be extended under Thompson when the clerk erroneously informed a pro se litigant regarding the time to file a notice of appeal, the deadline for notices of appeal has been held to affect the jurisdiction of the court of appeals. The requirements of Rule 4 of the Federal Rules of Appellate Procedure, for example, cannot be waived; accordingly, a court is not prohibited from considering a belated motion to dismiss for an untimely notice of appeal. See, e.g., Torres v. Oakland Scavenger Co., 487 U.S. 312, 317 (1988) (untimely notice of appeal affects appellate court's subject matter jurisdiction and cannot be waived and may be raised at any time). Thus, Moore is distinguishable from bar dates for filing claims which are in the nature of statute of limitations as to which equitable tolling principles may be brought to bear.

D.

In determining whether to apply the doctrine of equitable tolling, there are several factors the court may consider, and they include: (1) the lack of actual notice of the filing requirement; (2) the lack of constructive knowledge of the filing requirement; (3) the diligence used by the plaintiff in pursuing its rights; (4) the absence of prejudice to the defendant; and (5) the plaintiff's reasonableness in remaining ignorant of the notice requirement. Glarner v. Dep't of Veterans Admin., 30 F.3d 697, 702 (6th Cir. 1994). As observed by Washington v. Washington Metro. Area Transit Auth'y, 160 F.3d 750, 753 (D.C. Cir. 1998) (citations omitted), "[t]he court's equitable power to toll the statute of limitations will be exercised only in extraordinary and carefully circumscribed instances," and it will not apply to garden variety claims of excusable neglect in which there was a failure to exercise due diligence. Here, creditors were sent notice of the conversion of the case and of the date of the meeting of creditors (90 days from which was the deadline for filing claims under Rule 3002(c) although the notice did not so state). They were not misled as to the bar date, and could have inquired regarding what the bar date was. It is highly unlikely that any creditors will be able to show that

the exercised sufficient diligence to permit equitable tolling apply to them. In any event, the circumstances do not warrant invoking equitable estoppel without any creditor having moved for application of that doctrine.

## II

The court accordingly concludes that the court ought not adjust the bar date based on the clerk's having left the bar date space blank in the notice of the commencement of the case.<sup>4</sup> It is thus

ORDERED that the clerk shall give creditors notice of the actual bar date fixed by Rule 3002(c), and that the court will not adjust that bar date at this time.

[Signed and dated above.]

Copies to: Debtor; debtor's attorney; and Cynthia A. Niklas.

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<sup>4</sup> However, the bar date rule is not jurisdictional. See Kontrick v. Ryan, 540 U.S. 443 (2004) ("inflexible claim-processing rules" are not jurisdictional, so deadline for objecting to discharge was an affirmative defense that could be waived). Any untimely claim filed in this case will be an allowed claim unless and until it is objected to.